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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
14

15 **MATTHEW L. JOHNSON,**

16 Plaintiff,

17 v.

18 **DARR,**

08-CV-0080-DMS (POR)

19 **DEFENDANT'S REQUEST FOR**
JUDICIAL NOTICE

Hearing: August 28, 2008
Time: 2:00 p.m.
Courtroom: H
Judge: The Honorable
Louisa S. Porter

20
21 Under Federal Rule of Evidence 201 and *Lee v. City of Los Angeles*, 250 F.3d 668,
22 688-89 (9th Cir. 2001) (court may take judicial notice of matters of public record), Defendant
23 requests the Court to take judicial notice of the Court's file in *Johnson v. Darr*, case no. 06-CV-
24 01257-JAH (POR), including the pleadings and orders listed below and attached hereto:

25 Exhibit A: Complaint filed June 14, 2006 (exhibits to complaint not attached);
26 Exhibit B: Report and Recommendation, filed August 10, 2007;
27 Exhibit C: Order adopting Report and Recommendation, filed December 13, 2007;

28 ///

1 Exhibit D: Judgment, entered December 13, 2007

2 Dated: July 16, 2008

3 Respectfully submitted,

4 EDMUND G. BROWN JR.
Attorney General of the State of California

5 DAVID S. CHANEY
Chief Assistant Attorney General

6 ROCHELLE C. EAST
Acting Senior Assistant Attorney General

7 MICHELLE DES JARDINS
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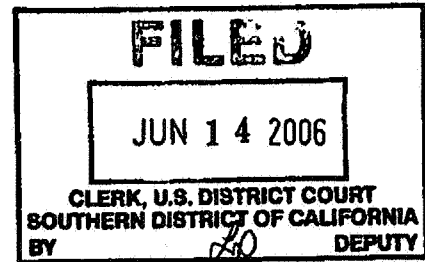
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10 /s/Phillip Lindsay
11 PHILLIP LINDSAY
Deputy Attorney General
Attorneys for Defendant

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Johnson v. Darr
United States District Court Case No. 08-CV-0080-DMS (POR)

Exhibit A:

Complaint filed June 14, 2006, in case no. 06-CV-01257-JAH (POR)

MATTHEW L. JOHNSON
(Name)DW-1140P / P.O. Box 689
(Address)Soledad, CA. 93960
(City, State, Zip)D-33369
(CDC Inmate No.)

United States District Court Southern District of California

MATTHEW LOUIS JOHNSON

(Enter full name of plaintiff in this action.)

Plaintiff,

v.

(A) CAPTAIN MR. DARR

(Enter full name of each defendant in this action.)

Defendant(s).

06CV 1257 JAN(POR)Civil Case No. _____
(To be supplied by Court Clerk)Complaint under the
Civil Rights Act
42 U.S.C. § 1983

2254	1983	<input checked="" type="checkbox"/>
FILING FEE PAID		
Yes	No	<input checked="" type="checkbox"/>
IFP MOTION FILE		
Yes	No	<input checked="" type="checkbox"/>
COPIES SENT TO		
Court	ProSe	

A. Jurisdiction

Jurisdiction is invoked pursuant to 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983. If you wish to assert jurisdiction under different or additional authority, list them below.

B. Parties

1. Plaintiff: This complaint alleges that the civil rights of Plaintiff, MATTHEW L. JOHNSON
(print Plaintiff's name)

, who presently resides at DW/1140P - P.O. Box 689
(mailing address or place of confinement)

Soledad, Ca. 93960, were violated by the actions

of the below named individuals. The actions were directed against Plaintiff at Centinel

State Prison, Imperial, CA. on (dates) 7-21-05, and _____
(institution/place where violation occurred) 92251 (Count 1) (Count 2) (Count 3)

2. Defendants: (Attach same information on additional pages if you are naming more than 4 defendants.)

Defendant (A) CAPTIAN MR. DARR resides in IMPERIAL CA. C.S.P.
(name) (County of residence)
 and is employed as a ACTING CAPTIAN. This defendant is sued in
(defendant's position/title (if any))

his/her ☒ individual ☐ official capacity. (Check one or both.) Explain how this defendant was acting

under color of law: BY INFLECTING CRUEL AND UNUSUAL PUNISHMENT ON PETITIONER AND VIOLATING HIS U.S. CONST. RIGHTS, 4th, 5th, 8th, 9th & 14th AMENDMENTS.

Defendant _____ resides in _____
(name) (County of residence)
 and is employed as a _____. This defendant is sued in
(defendant's position/title (if any))

his/her ☐ individual ☐ official capacity. (Check one or both.) Explain how this defendant was acting

under color of law: _____

Defendant _____ resides in _____
(name) (County of residence)
 and is employed as a _____. This defendant is sued in
(defendant's position/title (if any))

his/her ☐ individual ☐ official capacity. (Check one or both.) Explain how this defendant was acting

under color of law: _____

Defendant _____ resides in _____
(name) (County of residence)
 and is employed as a _____. This defendant is sued in
(defendant's position/title (if any))

his/her ☐ individual ☐ official capacity. (Check one or both.) Explain how this defendant was acting

under color of law: _____

C. Causes of Action (You may attach additional pages alleging other causes of action and the facts supporting them if necessary.)

Count 1: The following civil right has been violated: PLACED PETITIONER'S LIFE
(E.g., right to medical care, access to courts,
IN DANGER VINDICTIVELY-CRUEL AND UNUSUAL PUNISHMENT
due process, free speech, freedom of religion, freedom of association, freedom from cruel and unusual punishment,
etc.)

Supporting Facts: [Include all facts you consider important to Count 1. State what happened clearly and in your own words. You need not cite legal authority or argument. Be certain to describe exactly what each defendant, by name, did to violate the right alleged in Count 1.]

PLEASE SEE ATTACHED BRIEF, THERE'S NOT
ENOUGH ROOM ON THIS PAGE.

Count 2: The following civil right has been violated:

(E.g., right to medical care, access to courts,

due process, free speech, freedom of religion, freedom of association, freedom from cruel and unusual punishment, etc.)

Supporting Facts: [Include all facts you consider important to Count 2. State what happened clearly and in your own words. You need not cite legal authority or argument. Be certain to describe exactly what each defendant, *by name*, did to violate the right alleged in Count 2.]

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

Count 3: The following civil right has been violated:

(E.g., right to medical care, access to courts,

due process, free speech, freedom of religion, freedom of association, freedom from cruel and unusual punishment, etc.)

Supporting Facts: [Include all facts you consider important to Count 3. State what happened clearly and in your own words. You need not cite legal authority or argument. Be certain to describe exactly what each defendant, by name, did to violate the right alleged in Count 3.]

This image shows a full page of white paper with horizontal black ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

D. Previous Lawsuits and Administrative Relief

1. Have you filed other lawsuits in state or federal courts dealing with the same or similar facts involved in this case? ☒ Yes ☐ No.

If your answer is "Yes", describe each suit in the space below. [If more than one, attach additional pages providing the same information as below.]

(a) Parties to the previous lawsuit:

Plaintiffs: MATTHEW LOUIS JOHNSON

Defendants: % A. DIAZ

(b) Name of the court and docket number: U.S. DISTRICT COURT

SOUTHERN DISTRICT OF CA. CIVIL NO. 01CV0259-BTM(PDR)

(c) Disposition: [For example, was the case dismissed, appealed, or still pending?] THE CASE WAS DISPOSITIONED.

(d) Issues raised: DESTRUCTION OF LEGAL MATERIALS.

(e) Approximate date case was filed: IN COURT - 3/2001

(f) Approximate date of disposition: EXACT DATE - 4/22/02

2. Have you previously sought and exhausted all forms of informal or formal relief from the proper administrative officials regarding the acts alleged in Part C above? [E.g., CDC Inmate/Parolee Appeal Form 602, etc.] ? ☒ Yes ☐ No.

If your answer is "Yes", briefly describe how relief was sought and the results. If your answer is "No", briefly explain why administrative relief was not sought.

ON A 602 APPEAL'S FORM, IT HAS BEEN DENIED THROUGHTOUT THE C.D.C. SYSTEM, AND THE FINAL LEVEL, THE DIRECTOR'S OFFICE HAS FAILED TO RESPOND AND ATTEMPT TO DEPRIVE PETITIONER ACCESS TO COURT AND A SPEEDY TRIAL.

E. Request for Relief

Plaintiff requests that this Court grant the following relief:

1. An injunction preventing defendant(s): (A) CAPTIAN MR. DARR,
AND THE C.D.C. SYSTEM FROM CONTINUEING
ACT'S OF REPRISAL'S AGAINST HIM THROUGHOUT
HIS INCARCERATION PERIOD.

2. Damages in the sum of \$ 4,000,000.

3. Punitive damages in the sum of \$ 1,500,000.

4. Other: _____

F. Demand for Jury Trial

Plaintiff demands a trial by ☒ Jury ☐ Court. (Choose one.)

G. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 1983 Prisoner cases filed in this district, the Court has adopted a case assignment involving direct assignment of these cases to magistrate judges to conduct all proceedings including jury or bench trial and the entry of final judgment on consent of all the parties under 28 U.S.C. § 636(c), thus waiving the right to proceed before a district judge. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to utilize this efficient and expeditious program for case resolution due to the trial judge quality of the magistrate judges and to maximize access to the court system in a district where the criminal case loads severely limits the availability of the district judges for trial of civil cases. Consent to a magistrate judge will likely result in an earlier trial date. If you request that a district judge be designated to decide dispositive motions and try your case, a magistrate judge will nevertheless hear and decide all non-dispositive motions and will hear and issue a recommendation to the district judge as to all dispositive motions.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including trial, and the entry of final judgment by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☒ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

8/30/06
 Date

Matthew L. Johnson
 Signature of Plaintiff

COUNT 1: PERSONAL INJURY SUIT OF THE CIVIL RIGHT ACT ON A INMATE THAT WAS CAUSED BY AN PRISON OFFICIAL/GOVERNMENT EMPLOYEE.

SUPPORTING FACTS:

On January 5, 2003, STG. MR. DARR, alone with several other officer's came and vindictively Ramsacked Petitioner's cell and Confiscated numerous personal items while Petitioner was handcuffed from a lockdown of D-Facility, Petitioner's cell was the Only cell that was searched by these officer's, STG. MR. DARR was the officer in charged of this search, a hole nother shift searched the remaining cells on that Facility.

Petitioner submitted a 602 Complaint form, log # CEN-D-03-0175, and also submitted a letter to the DISTRICT COURT, SOUTHERN DISTRICT, TO HON. JUDGE L. PORTER, To Inform her of the act, based upon, Petitioner had Dispositioned a case against staff member's at the same Facility in front of Hon. JUDGE L. PORTER months prior to this Reprisal act, and on January 24, 2003, Petitioner was called to D-Facility program office, and again, the officer, STG. MR. DARR admitted guilt, and Petitioner was compensated with a 13 inch color T.V. By Captain Calderon to drop the complaint against Stg. MR. DARR, STG. DARR was later moved to another Facility.

On about March of 2005, MR. DARR was Re-assigned back to D-Facility, BUT, only this time as a Higher Ranked officer, a LT. AND Petitioner then wrote and informed the Warden, G.S. GUIRBINO, THE DIRECTOR OF CORRECTIONS in Sacramento, and the Federal Prosecutor MR. N. PAUL of this officer's MISconduct, and on JULY 17, 2005, a Racial Riot took place in D-Facility Dining hall, Blacks against Hispanics, and on 7-19-05, LT. DARR was now Acting Captain on D-Facility, and he called petitioner and (3) other Inmates to the program OFFICE under escort and handcuffs, all Inmates that were called were Mac Reps. of D-Facility, Captain DARR then informed all (4) Mac Reps, (2) Blacks, including myself, and (2) Hispanics, that the Blacks won the Riot, Petitioner responded, that wasn't very professional Captain, DARR responded, (O well), this statement was witnessed by STG. Zamora 2nd watch and % Hubson on D-Facility, and he then ordered all Mac Reps. back to there Cells.

On July 21, 2005, all Mac Reps were again called back to the program OFFICE by Captain DARR, and when we arrived, he stated verbatim, (HAY GUYS, WE ARE GOING TO GO TO ALL THE BUILDINGS AND TALK TO THE

INMATES IN THEIR CELLS, BUT WE ARE GOING TO SPLIT UP INTO (2) GROUPS, STG. ZAMORA YOU TAKE THOSE (3) INMATES AND START AT BUILDING (5), AND ME AND JOHNSON WILL START AT BUILDING (1) AND WE WILL MEET UP AT BUILDING (3), everyone complied, and when Petitioner and Captain DARR arrived at Building (1), all inmates were locked in their cells, Petitioner was the only inmate out, at the pot room on the floor, it was (2) other officer's and (1) in the control tower to ensure Petitioner's safety, Petitioner began going cell to cell talking to all the inmates, trying to resolve the racial tension that was very high as the riot was only days prior to this, Captain DARR stood and talked to the control officer in the tower, as Petitioner reached A-section, which was the last Black cell on the upper tier, (4) Hispanic cell's were opened all at the same time, and (8) Hispanics came out at once, Petitioner was savagely attacked, and lost consciousness, when Petitioner realized what was going on, he was being handcuffed by several officers, Petitioner was taken to D-Facility, M.T.A. and the M.T.A. informed the officer's that Petitioner needed

Steches in his lip and head, Petitioner was then taken to the D-Facility program office, where Captain DARR approached Petitioner with a smile on his face and stated verbatim, (WOW JOHNSON, I'M SORRY ABOUT THAT), And left Petitioner in handcuffs in the program office until the GOON Squad/Investigation Squad came and took pictures of Petitioner, % MS. Salazar took the Photos of Petitioner, Petitioner was then taken to the Health Clinic and recieved the steches, as his teeth was knocked throw his lip. Captain DARR who was incharged of D-Facility and of that Situation, ordered Petitioner to the hole/Ad-seg, claiming Petitioner is now a threat to the safety and security of that Institution, and on July 28, 05, ICC confirmed and excepted Captain DARR Recommendation, and told Petitioner he would remain in Ad-seg Pending transfer, and on 8/10/05, Petitioner was given his legal materials while still in Ad-seg, Petitioner was fully deprived of all other personal property, Petitioner then filed his Complaint against Captain DARR, during Petitioner's stay in Ad-seg, Petitioner was tornted by Centinela staff members, and on August of 2005, Petitioner was interviewed by M.D. LISSAUR, and was

Prescribed Meds to help him sleep, Zyprexa, and on August 11, 2005, Petitioner was took back to ICC, and put up for transfer per Heat Meds. the Chair person of the Committee was MS. R. HOUSTON A.W.

This officer Captain DARR not only acted unprofessional and broke his ethnic code of Duty By the C.D.C. system by ordering the DI-Tower officer to open those cells, he also Breached Petitioner's Constitutional Right to be Reframed from cruel and Unusalt Punishment, and remain from acts of Reprisal's, Petitioner is now lobled by a Medical Doctor as Paranoid and skitso Franic, and remain under Doctor's care here at C.T.F. Soledad State Prison. see attached exhibits.

This officer also Comitted a felony offense, ACCESSARY to a BATTERY on a Inmate, which could have resulted in a Death, his action has not only Violated Petitioner's California and U.S. Constitutional Rights that's guaranteed by the U.S. Constitution, California Const. Article 1, section I; Article 7, section (2); In re Ferguson, (1971) 5 Cal. 3d. 523, 531; People v. Hill, (1998) 17 Cal. 4th 800, 845; U.S. Const. 4th, 5th, 8th, 9th, and 14th Amendment. Whitley v. ALBERS, (1986) 475 U.S. 312,

106 S. Ct. 1678, 89 L. Ed. 2d. 251;
 Turner v. Safley, (1987) 482 U.S. -, 107
 S. Ct. 2254, 96 L. Ed. 2d. 64; Daniels
 v. Williams, (1986) 474 U.S. 327, 106
 S. Ct. 662, 88 L. Ed. 2d. 662. Civil
 Procedures, section 340 (3) ACCESSARY
 to a ASSAULT and BATTERY, C.D.C.
 Title 15, Section 3190. Part (2).
 section 3193 Liability, Part (b).
 This officer has breached his Contract
 with the C.D.C. System, which is
 to act Professional at all times,
 and to protect and to serve as a
 Government agent, it is also well
 settled that if an Inmate can prove
 that an officer has endangered an
 Inmate life within the system he
 or she MUST be Released from
 custody forthwith. see, Weems v.
 U.S. (1909) 217 U.S. 349 [30 S. Ct. 544,
 54 L. Ed. 793]; Arizona v. Youngblood,
 (1988) 488 U.S. 51-58; In this case,
 it is well proven. Petitioner wishes
 also to have LT. Granish called as
 a witness at Centinela State Prison,
 as he also approached petitioner
 the day of the incident and infor-
 med Petitioner that he had been
 called in from home by the warden
 to clean up Captain DARR mess.
 Petitioner exhausted all his administ-
 rative remedies, and submitted this

Complaint to the final level in Sacramento, it stayed there for 7 months until Petitioner requested a response, then he received a response proclaiming he didn't give the 2nd level the chance to respond, which was untrue, please see attached exhibit, that was only an attempt to continue to deny Petitioner of his right to a speedy trial, Petitioner is now submitting this Report to this Hon. Court with a PRAYER of Relief.

'Final Conclusion'

Contain within this Petition is clearly an act of bad faith by the C.D.C. system, and therefore Petitioner Pray this Hon. Court grant Relief in the sum of requested, \$2,500,000, as well as to order Petitioner's release forthwith to ensure his safety from further acts of Reprisals.

Respectfully Submitted,

Petitioner
Prose Matthew L. Johnson
Matthew L. Johnson
Dated: 5/30/08

Johnson v. Darr
United States District Court Case No. 08-CV-0080-DMS (POR)

Exhibit B:

**Report and Recommendation filed August 10, 2007, in case no.
06-CV-01257-JAH (POR)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MATTHEW L. JOHNSON,

Plaintiff,

v.

CORRECTIONAL CAPTAIN DARR,

Defendant.

Civil No. 06cv1257-JAH (POR)

**REPORT AND RECOMMENDATION
GRANTING DEFENDANT'S MOTION
TO DISMISS**

[Doc. No. 7]

I. INTRODUCTION

On June 14, 2006, Plaintiff Matthew L. Johnson, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against Defendant Correctional Captain Darr [Doc. No. 1]. Plaintiff sues Defendant in his individual capacity. (Complaint at 2.) Plaintiff contends Defendant violated his Fourth, Fifth, Eighth, Ninth and Fourteenth Amendment rights of the United States Constitution and Article 1, section 7, paragraph (a) of the California Constitution.¹ (Complaint at 2; Complaint's Count 1 at 5.)²

¹ Article 1, section 7, paragraph (a) addresses a person's right not to be deprived of life, liberty, or property without due process of law or be denied equal protection of the laws. The Court assumes Plaintiff alleges a violation of Article 1, section 7, paragraph (a) of the California Constitution rather than "Article 1, section I and Article 7, section(a)" as stated in his complaint since there is no "section I" under Article 1 and no "section (a)" under Article 7 that is not preceded by a number. Additionally, Plaintiff's claim relates to the deprivation of life in that he alleges Defendant's conduct could have resulted in Plaintiff's death. (Complaint's Count 1 at 5.)

² For clarity and convenience, the Court refers to what Plaintiff calls his "attached brief," which constitutes his supporting facts for Count 1, as "Complaint's Count 1." Plaintiff has marked each of the seven pages with page numbers. The Court utilizes Plaintiff's page designation throughout this Report and Recommendation.

Defendant filed a Motion to Dismiss Plaintiff's Complaint on December 4, 2006 [Doc. No. 7]. ("Def.'s Mot.") Defendant argues (1) Plaintiff's complaint be dismissed because Plaintiff failed to exhaust administrative remedies; (2) Plaintiff's state law cause of action be dismissed since he failed to allege he timely filed a government tort claim; (3) Plaintiff's Fourth, Fifth, Ninth, and Fourteenth Amendment claims, and California constitutional claim be dismissed under Federal Rule of Civil Procedure 12(b)(6); and (4) Plaintiff's Fifth and Fourteenth Amendment claims be dismissed since they are subsumed into his Eighth Amendment claim. (Def.'s Mot. at 2, 5-10.)

On January 4, 2007, Plaintiff filed an Opposition to Defendant's Motion to Dismiss [Doc. No. 14].

After thorough review of the parties' papers and all supporting documents, this Court recommends Defendant's Motion to Dismiss be **GRANTED**.

II. BACKGROUND

On July 17, 2005, a race riot took place at Centinela State Prison (CSP) in Imperial, California, between African-American and Hispanic inmates in facility D. (Complaint's Count 1 at 2.) On July 21, 2005, Defendant called Plaintiff and three other inmates to the program office. (*Id.*) Plaintiff and the three other inmates were "Mac Reps" of facility D.³ (*Id.*) Defendant informed the Mac Reps that they were going to split up into two groups and talk to the inmates in all of the buildings. (*Id.*) Plaintiff was paired with Defendant and the other three inmates were grouped with Sgt. Zamora. (Complaint's Count 1 at 3.)

According to Plaintiff, when he and Defendant arrived at Building 1, all of the inmates were locked in their cells. (*Id.*) As Plaintiff moved from cell to cell speaking with each inmate, Defendant was in the control tower with the control officer. (*Id.*) When Plaintiff reached the last African-American cell, Plaintiff alleges Defendant ordered the control tower officer to open four Hispanic cells, at which time eight Hispanics exited their cells and attacked Plaintiff. (*Id.*) Plaintiff

³ Plaintiff does not define "Mac Reps" in his Complaint. However, Defendant indicates in his Motion to Dismiss "that the term 'Mac Reps' refers to representatives of the Men's Advisory Counsel." Defendant further states, "[a] Men's Advisory Counsel is a body of inmates selected by the general population of inmates to act in an advisory capacity to the Warden, and his or her administrative staff, in matters of common interest and concern to the general inmate population and administration. Cal. Dep't of Corrections Operations Manual, § 53120.1."

received stitches in his lip and head due to the attack. (Complaint's Count 1 at 4.)

Plaintiff further alleges Defendant ordered Plaintiff to be placed in Administrative Segregation, where Plaintiff was informed he would remain pending transfer to another institution. (*Id.*)

III. DISCUSSION

A. Dismissal of Plaintiff's Fourth, Fifth, Ninth, and Fourteenth Amendment Claims Pursuant to FED. R. CIV. P. 12(b)(6)

Plaintiff argues Defendant's conduct amounted to cruel and unusual punishment thereby violating his Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendment rights. (Complaint at 2.)

Defendant contends Plaintiff's Fourth, Fifth, Ninth, and Fourteenth Amendment claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief may be granted. (Def.'s Mot. at 2.) Defendant further asserts Plaintiff's Fifth and Fourteenth Amendment claims should be dismissed since they are subsumed under his Eighth Amendment claim. (*Id.*)

Upon thorough review of Plaintiff's claims, the Court recommends that Plaintiff's Fourth, Fifth, Ninth, and Fourteenth Amendment claims be dismissed pursuant to Rule 12(b)(6). The Court addresses Plaintiff's Eighth Amendment claim in section B.

1. Standard of Review per FED. R. CIV. P. 12(b)(6)

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. A claim cannot be dismissed unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986); Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). In order to survive a motion to dismiss, a plaintiff must "allege overt acts with some degree of particularity such that his claim is set forth clearly enough to give defendants fair notice of the type of claim being pursued." Ortez v. Washington County, 88 F.3d 804, 810 (9th Cir. 1996).

The court must accept as true all material allegations in the complaint, as well as reasonable

1 inferences to be drawn from them, and must construe the complaint in the light most favorable to the
 2 plaintiff. N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Parks School of
 3 Business, Inc., 51 F.3d at 1484. The court looks not at whether the plaintiff will “ultimately prevail
 4 but whether the claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416
 5 U.S. 232, 236 (1974); Display Research Laboratories, Inc. v. Telegen Corp., 133 F. Supp. 2d 1170,
 6 1173 (N.D. Cal. 2001).

7 Where a plaintiff appears in *propria persona* in a civil rights case, the court must construe
 8 the pleadings liberally and afford the plaintiff any benefit of the doubt. Karim-Panahi v. Los
 9 Angeles Police Dep’t, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is
 10 “particularly important in civil rights cases.” Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir.
 11 1992). In giving liberal interpretation to a *pro se* civil rights complaint, however, the court may not
 12 “supply essential elements of claims that were not initially pled.” Ivey v. Board of Regents of the
 13 University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Vague or conclusory allegations are not
 14 sufficient to withstand a motion to dismiss in civil rights violations. Id.; see also Jones v.
 15 Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations
 16 unsupported by facts are insufficient to state a claim under section 1983). “The plaintiff must allege
 17 with at least some degree of particularity overt acts which defendants engaged in that support the
 18 plaintiff’s claim.” Jones, 733 F.2d at 649 (internal quotation omitted).

19 In addition, when resolving a motion to dismiss for failure to state a claim, the court may not
 20 generally consider materials outside the pleadings. Schneider v. California Dep’t of Corrections,
 21 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). “The focus of any Rule 12(b)(6) dismissal . . . is the
 22 complaint.” Id. at 1197 n.1. However, the court may consider documents or exhibits “whose
 23 contents are alleged in a complaint and whose authenticity no party questions.” Branch v. Tunnell,
 24 14 F.3d 449, 454 (9th Cir. 1994); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555
 25 (9th Cir. 1990); Stone v. Writer’s Guild of Am. W. Inc., 101 F.3d 1312, 1313-14 (9th Cir. 1996).

26 2. Plaintiff’s Fourth, Fifth and Fourteenth Amendment Claims

27 Plaintiff claims Defendant violated his Fourth, Fifth and Fourteenth Amendment rights.
 28 (Complaint at 2.) Defendant argues these claims should be dismissed because (1) Plaintiff fails to

1 allege sufficient facts to support his claims, and (2) Plaintiff's Fifth Amendment and Fourteenth
2 Amendment claims are subsumed under Plaintiff's Eighth Amendment claim. (Def.'s Mot. at 12-
3 13.)

4 Here, Plaintiff fails to allege sufficient facts showing how Defendant's actions resulted in a
5 violation of his Fourth, Fifth and Fourteenth Amendment rights. Plaintiff's allegations are
6 conclusory in that he merely lists these constitutional rights as being violated without providing facts
7 to support his claim. Therefore, Plaintiff's claims based on the Fourth, Fifth and Fourteenth
8 Amendments should be dismissed for failure to sufficiently state a claim.

9 Further, Plaintiff's Fourth, Fifth and Fourteenth Amendment claims should be dismissed
10 because his claims can be analyzed under an explicit textual source of rights in the Constitution.
11 "[C]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of
12 the Constitution's commands." Armendariz v. Penman, 75 F.3d 1311, 1320 (9th Cir. 1996).
13 However, the Supreme Court has held that plaintiffs cannot "double up" constitutional claims in this
14 way: Where a claim can be analyzed under "an explicit textual source" of rights in the Constitution,
15 a court may not also assess the claim under another, "more generalized," source. Graham v. Connor,
16 490 U.S. 386, 394-95 (1989) (analyzing claim under Fourth Amendment but not under substantive
17 due process); see also Hufford v. McEnaney, 249 F.3d 1142, 1151 (9th Cir. 2001) (analyzing claim
18 under First Amendment but not under substantive due process); Armendariz, 75 F.3d at 1319
19 (analyzing claim under Fourth and Fifth Amendments but not under substantive due process).

20 Here, Plaintiff asserts Defendant's conduct amounted to cruel and unusual punishment and
21 has alleged facts to support this claim. (Complaint at 2; Complaint's Count 1 at 5.) In so alleging,
22 he claims Defendant violated several of his constitutional rights, such as his Fourth, Fifth, Eighth
23 and Fourteenth Amendment rights. (Id.) However, Plaintiff's complaint can be analyzed solely
24 under the Eighth Amendment since the Fourth, Fifth and Fourteenth Amendments constitute more
25 generalized sources for his claim. The Eighth Amendment provides an explicit textual source for
26 Plaintiff's claim which states: "Excessive bail shall not be required, nor excessive fines imposed, *nor*
27 *cruel and unusual punishments inflicted.*" (emphasis added) U.S. CONST. amend. VIII. Thus,
28 Plaintiff's Fourth, Fifth and Fourteenth Amendment claims should be dismissed.

Because Plaintiff failed to allege sufficient facts to sustain his Fourth, Fifth, and Fourteenth Amendment claims and his claim should be analyzed under the Eighth Amendment, the Court recommends Plaintiff's Fourth, Fifth and Fourteenth Amendment claims be dismissed without prejudice.

3. Plaintiff's Ninth Amendment Claim

The Supreme Court has repeatedly voiced concern that a section 1983 claim be based on a specific constitutional guarantee. Daniels v. Williams, 474 U.S. 327, 333 (1986); Parratt v. Taylor, 451 U.S. 527, 544 (1981); Paul v. Davis, 424 U.S. 693, 700-01 (1976). The Ninth Amendment states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. It has been argued that the Ninth Amendment protects rights not enumerated by the first eight Amendments. See Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring); Wise v. Bravo, 666 F.2d 1328, 1332 (10th Cir. 1981). Nevertheless, "the Ninth Amendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim." Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986); San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121, 1124-25 (9th Cir. 1996) (internal quotation marks omitted).

Since the Ninth Amendment does not confer an independent substantive constitutional right, the Court recommends Plaintiff's Ninth Amendment claim be dismissed with prejudice.

4. Conclusion

Based on the analysis above, the Court recommends that Defendant's motion to dismiss pursuant to Rule 12(b)(6) be GRANTED as to Plaintiff's Fourth, Fifth, Ninth, and Fourteenth Amendment claims.

B. Dismissal of Plaintiff's Eighth Amendment Claim Based on Exhaustion

Plaintiff argues Defendant violated his Eighth Amendment right to be free from cruel and unusual punishment when he allegedly ordered certain cells be opened and allowed the inmates of those cells to physically injure Plaintiff. (Complaint's Count 1 at 3-4.)

Defendant claims Plaintiff failed to exhaust available administrative remedies pursuant to 42 U.S.C. § 1997e(a) before bringing this suit, and therefore seeks dismissal under the "non-

1 enumerated” provisions of Federal Rule of Civil Procedure 12(b).

2 The Ninth Circuit has held that “failure to exhaust nonjudicial remedies is a matter of
3 abatement” not going to the merits of the case and is properly raised pursuant to a motion to dismiss,
4 including a non-enumerated motion under Rule 12(b). See Ritza v. Int’l Longshoremen’s &
5 Warehousemen’s Union, 837 F.2d 365, 368-69 (9th Cir. 1988); Wyatt v. Terhune, 315 F.3d 1108,
6 1119 (9th Cir. 2003) (finding a non-enumerated motion under Rule 12(b) to be “the proper pretrial
7 motion for establishing nonexhaustion” of administrative remedies under 42 U.S.C. § 1997e(a)).⁴
8 Nonexhaustion under § 1997e(a) is an affirmative defense - defendants have the burden of raising
9 and proving the absence of exhaustion. Jones v. Bock, 549 U.S. ---- 127 S. Ct. 910, 919 (2007);
10 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (same); see also Brown v. Valoff, 422 F.3d
11 926, 936-37 (9th Cir. 2005) (“[T]here can be no ‘absence of exhaustion’ unless *some* relief remains
12 ‘available,’” therefore, “a defendant must demonstrate that pertinent relief remained available,
13 whether at unexhausted levels of the grievance process, or through awaiting the results of the relief
14 already granted as a result of that process.”). However, unlike under Rule 12(b)(6), “[i]n deciding a
15 motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the
16 pleadings and decide disputed issues of fact.” Id. at 1120 (citing Ritza, 837 F.2d at 369).

17 Before the Prison Litigation Reform Act (“PLRA”) was enacted on April 26, 1996, prisoners
18 pursuing civil rights claims under 42 U.S.C. § 1983 were not required to exhaust administrative
19 remedies before filing suit in federal court. See Patsy v. Bd. of Regents of Florida, 457 U.S. 496,
20 516 (1982). The PLRA amended 42 U.S.C. § 1997e(a) to provide however, that “[n]o action shall
21 be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any
22 jail, prison or other correctional facility until such administrative remedies as are available are
23 exhausted.” 42 U.S.C. § 1997e(a). “Once within the discretion of the district court, exhaustion in
24 cases covered by § 1997e(a) is now mandatory.” Porter v. Nussle, 534 U.S. 516, 532 (2002). 42
25 U.S.C. § 1997e(a) has been construed broadly to “afford [] corrections officials time and

26
27 ⁴ In so finding, the Ninth Circuit also made clear that unlike a motion for summary judgment,
28 “dismissal of an action in the ground of failure to exhaust administrative remedies is not on the merits.”
Wyatt, 315 F.3d at 1119 (citation omitted). Thus, if the court finds that the prisoner has failed to
exhaust nonjudicial remedies, “the proper remedy is dismissal of the claim without prejudice.” Id.
(citing Ritza, 837 F.2d at 368 & n.3).

1 opportunity to address complaints internally before allowing the initiation of a federal case, id. at
 2 525-26, and to encompass inmate suits about both general circumstances and particular episodes of
 3 prison life--including incidents of alleged excessive force. Id. at 532. Finally, "[t]he 'available'
 4 'remed[y]' must be 'exhausted' before a complaint under § 1983 may be entertained," "regardless of
 5 the relief offered through administrative procedures." Booth v. Churner, 532 U.S. 731, 738, 741
 6 (2001);⁵ see also McKinney v. Carey, 311 F.3d 1198, 1200-01 (9th Cir. 2002) (finding that
 7 prisoner's civil rights action must be dismissed without prejudice unless prisoner exhausted
 8 available administrative remedies *before* he filed suit, even if he fully exhausts while the suit is
 9 pending).

10 The prisoner must also comply with the state's "critical procedural rules" governing its
 11 administrative grievance or appeals procedure in order to "properly exhaust." See Woodford v.
 12 Ngo, ___ U.S. ___, 126 S.Ct. 2378, 2388 (2006). "[Proper exhaustion] means ... a prisoner must
 13 complete the administrative review process in accordance with the applicable procedural rules ... as
 14 a precondition to bring[ing] suit in federal court." Id. at 2386. In Woodford, the Supreme Court
 15 held that a California prisoner whose grievances were rejected all the way up to the third or
 16 "Director's Level" of review based on his failure to comply with CAL. CODE REGS., tit. 15 §
 17 3084.5's 15-day time limit for submitting CDC 602 appeals, did not "properly exhaust" and
 18 therefore, his claims were subject to dismissal pursuant to 42 U.S.C. § 1997e(a). Id. at 2387-93; cf.
 19 Jones v. Stewart, 457 F. Supp. 2d 1131, 1134 (D. Nev. 2006) (reading Woodford to set forth two
 20 tests for proper exhaustion: a "merits test" whereby the prisoner's grievance is fully addressed on
 21 the merits by the administrative agency and appealed through all the agency's levels, and a

22
 23 ⁵ In Booth, the Supreme Court resolved a split among the Circuits as to whether a state prison
 24 grievance procedure which is incapable of providing money damages is "available" under section
 25 1997e(a) and therefore must be exhausted before the prisoner files federal suit under 42 U.S.C. § 1983
 26 seeking those damages. Looking both to the plain language of the statute and to the legislative history
 27 behind the PLRA, the Court held the exhaustion of "available" administrative remedies under §
 28 1997e(a) is required in prison condition cases so long as the "prison administrative process [...] could
 provide some sort of relief on the complaint stated" regardless of whether that process can provide "the
 remedial action [the] inmate demands." Booth, 532 U.S. at 734, 736. In other words, no matter the
 specific "form of relief sought and offered through administrative avenues," the prisoner must exhaust
 his claims through the existing administrative processes, even if he seeks money damages which are not
 authorized, so long as those procedures have the "authority to provide any relief" or permit prison
 officials to take "some action in response to the complaint." Id. at 736, 741 nn. 4, 6.

1 “compliance test” whereby the prisoner must comply with all “critical procedural rules,” including
2 agency deadlines. If a plaintiff prisoner meets either test, a court will find proper exhaustion. If a
3 defendant can show that the plaintiff failed to meet both the merits and compliance tests, a motion to
4 dismiss for failure to exhaust administrative remedies will be granted).

5 The State of California provides its inmates and parolees the right to appeal administratively
6 “any departmental decision, action, condition or policy perceived by those individuals as adversely
7 affecting their welfare.” See CAL.CODE REGS. tit. 15, § 3084.1(a). It also provides its inmates the
8 right to file administrative appeals alleging misconduct by correctional officers. See *id.* § 3084.1(e).
9 In order to exhaust available administrative remedies within this system, a prisoner must proceed
10 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602
11 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level
12 appeal to the Director of the California Department of Corrections. See *id.* § 3084.5; *Brown*, 422
13 F.3d at 929-30; see also *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). A decision
14 from the Director’s Level of review is “not appealable and concludes the inmate’s or parolee’s
15 departmental administrative remedy,” *Brown*, 422 F.3d at 930 n.2, and, thus, has been found
16 sufficient to satisfy § 1997e(a). See *Barry*, 985 F. Supp. at 1237-38.

17 In the instant case, Defendant has shown that Plaintiff did not properly exhaust his
18 administrative remedies. See *Wyatt*, 315 F.3d at 1119 (defendants have the burden of proving non-
19 exhaustion). Specifically, Defendant shows Plaintiff failed to complete the Third Level of Review
20 before bringing this suit.⁶ See *Brown*, 422 F.3d at 936-37; *Woodford*, __ U.S. __, 126 S.Ct. at 2388
21 (prisoner properly exhausts his administrative remedies when he complies with the state’s critical
22 procedure rules governing its grievance or appeals procedure).

23 On August 12, 2005, Plaintiff filed his CDC 602 inmate appeal form for review at the First
24
25
26

27 ⁶ There is no indication in the pleadings whether Plaintiff sought informal resolution prior to
28 filing an appeal at the First Level of Review. However, Defendant does not address this stage of the
appeal process and argues only that Plaintiff has not exhausted his administrative remedies due to his
failure to complete the Third Level of Review.

1 Level of Review. (Complaint at Exhibit N-3⁷; Def.'s Mtn. at Exhibit 1.) Plaintiff's appeal was
 2 denied on September 28, 2005. (Complaint at Exhibit N-5; Def.'s Mtn. at Exhibit 2.) On January
 3 10, 2006, Plaintiff's appeal was denied at the Second Level of Review and was informed that he
 4 could appeal this decision to the Director's Level of Review, the Third Level of Review.
 5 (Complaint at Exhibit N-6, N-7; Def.'s Mtn. at Exhibit 4.)

6 The Inmate Appeals Branch, which conducts the final review of an appeal, constitutes the
 7 Director's Level or Third Level of Review and is the final step of an inmate's administrative remedy
 8 process. (Granis Decl. ¶ 4.) In a letter dated May 19, 2006, the Inmate Appeals Branch informed
 9 Plaintiff that his appeal documents were being returned to him because the appeal form he submitted
 10 did not indicate his appeal had been completed through the Second Level of Review. (Complaint at
 11 Exhibit I; Granis Decl. ¶ 8.)

12 Although the May 19, 2006 letter instructed Plaintiff to contact the Appeals Coordinator if he
 13 disagreed with the Inmate Appeals Branch's decision and further directed him to contact his
 14 assigned counselor, the Appeals Coordinator, or his Parol Agent to help answer any questions he
 15 may have about the appeals process, neither Plaintiff nor Defendant allege facts or present evidence
 16 demonstrating Plaintiff had taken any of these steps. (*Id.*)

17 The evidence offered by Defendant supports a finding that Plaintiff did not correct the
 18 deficiency and re-submit the appeal for consideration at the Third Level of Review. (Granis Decl.
 19 ¶¶ 9-10.) A review of the records by the Inmate Appeals Branch shows "[n]o third level appeals
 20 have been accepted for review...from Plaintiff Matthew Johnson, CDCR #D-33369,...against
 21 Defendant Lieutenant Darr, pertaining to conspiracy and assault in July 2005." (Granis Decl. ¶ 10.)
 22 Additionally, the Appeals Office did not receive "any correspondence or telephone calls from
 23 Inmate Matthew Johnson, CDC #D-33369, pertaining to appeal log no. CEN-D-05-01339 [appeal
 24 relating to July 21, 2005 incident filed by Plaintiff against Defendant] seeking instructions on how to
 25 proceed after his appeal was rejected at the Third Level." (DeGeus Decl. ¶ 7.) Therefore, the Court
 26 finds that Defendant has carried his burden of proving non-exhaustion. *See Wyatt*, 315 F.3d at 1119

27 ⁷ Plaintiff labeled seven pages in the Exhibit portion of his complaint with "N." For clarity and
 28 convenience, the Court has designated the first page marked with "N" as "N-1" and continued this form
 of identification for the following pages labeled "N" with the next consecutive number.

(defendants have the burden of proving non-exhaustion).

Plaintiff has not properly exhausted his administrative remedies due to his failure to complete the Third Level of Review as required by CAL.CODE REGS. tit. 15, § 3084.5. Accordingly, Plaintiff's Eighth Amendment claim is subject to dismissal pursuant to 42 U.S.C. § 1997e(a) and the Court recommends that Plaintiff's Eighth Amendment claim be dismissed without prejudice and without leave to amend the complaint.⁸

C. Dismissal of Plaintiff's State Law Claim Based on 28 U.S.C. § 1367(c)(3)

Plaintiff argues Defendant not only violated his federal constitutional rights, but he also violated Plaintiff's California constitutional rights provided by Article 1, section 7, paragraph (a). (Complaint's Count 1 at 5.) Article 1, section 7, paragraph (a) of the California Constitution provides in part that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws..." Cal. Const. art. I, § 7(a). Plaintiff does not explain in his complaint how the rights provided by this provision of the California Constitution have been violated. Nevertheless, Plaintiff's state law claim should be dismissed, pursuant to 28 U.S.C. § 1367(c)(3), since all of Plaintiff's federal claims will be dismissed.

The Court has jurisdiction to review Plaintiff's state claims pursuant to 28 U.S.C. § 1367(a). According to 28 U.S.C. § 1367(a), in any civil action in which the district court has original jurisdiction, the district court "shall have supplemental jurisdiction over all other claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III," except as provided in subsections (b) and (c). "[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction over state law claims under 1367(c) is discretionary." Acri v. Varian Assoc., Inc., 114 F.3d 999, 1000 (9th Cir. 1997).

Under 28 U.S.C. § 1367(c)(3), the court has discretion to dismiss state law claims when it

⁸ The Ninth Circuit holds that a prisoner must exhaust his administrative remedies before filing any papers with the federal courts. Vaden v. Summerhill, 449 F.3d 1047 (9th Cir. 2006); McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). In other words, a prisoner cannot exhaust his administrative remedies during the pendency of an action in federal court. The Court found that the language in § 1997e(a) ("no action shall be brought") means that an action is "brought" when the action, i.e., the original Complaint, is first stamped "filed" by the Clerk of the Court. Thus, amending the complaint at this stage would be futile.

1 has dismissed all of plaintiff's federal claims. "In the usual case in which federal law claims are
 2 eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction
 3 over the remaining state law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7
 4 (1988); Schneider v. TRW, Inc., 938 F.2d 986, 993 (9th Cir. 1991). The Supreme Court has
 5 cautioned that "if the federal claims are dismissed before trial, ... the state claims should be
 6 dismissed as well." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

7 As previously discussed, the Court recommends that Plaintiff's Fourth, Fifth, Eighth, Ninth,
 8 and Fourteenth Amendment claims be dismissed. Since dismissal of these claims would leave
 9 Plaintiff with no other federal claims, Plaintiff's state law claim should be dismissed as well
 10 pursuant to 28 U.S.C. § 1367(c)(3). Accordingly, the Court recommends Plaintiff's state law claim
 11 be dismissed without prejudice.

12 **D. Defendant's Motion to Strike Plaintiff's Prayer for Relief**

13 Plaintiff seeks the following remedies: (1) relief in the amount of \$2,500,000; and (2) to be
 14 released from custody. (Complaint's Count 1 at 7.) As to Plaintiff's prayer to be released from
 15 custody, Defendant moves to strike such relief pursuant to Federal Rule of Civil Procedure 12(f).
 16 (Def.'s Mot. at 13-14.)

17 Under Rule 12(f), a party may move to strike "from any pleading any insufficient defense or
 18 any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). "[T]he
 19 function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise
 20 from litigating spurious issues by dispensing with those issues prior to trial." Sidney-Vinstein v.
 21 A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

22 Motions to strike are generally disfavored. Cairns v. Franklin Mint Co., 24 F. Supp. 2d
 23 1013, 1037 (C.D. Cal. 1998). However, a motion to strike may be granted when "it is clear that the
 24 matter to be stricken could have no possible bearing on the subject matter of the litigation." LeDuc
 25 v. Kentucky Central Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992); see also Colaprico v. Sun
 26 Microsystems, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991).

27 "[A] motion to strike may be used to strike any part of the prayer for relief when the damages
 28 sought are not recoverable as a matter of law." Bureerong v. Uvawas, 922 F. Supp. 1450, 1479 n.34

(N.D. Cal. 1996) (citing Tapley v. Lockwood Green Engineers, Inc., 502 F.2d 559, 560 (8th Cir. 1974)).

Traditionally, plaintiffs who seek to attack the validity or duration of confinement must pursue the exclusive remedy of a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973); Heck v. Humphrey, 512 U.S. 475, 481 (1994). “[A] prisoner in state custody cannot use a § 1983 action to challenge ‘the fact or duration of his confinement.’” Wilkinson v. Dotson, 125 S.Ct. 1242, 1245 (U.S. March 7, 2005) (No. 03-287) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)); see also Wolff v. McDonnell, 418 U.S. 539, 554 (1974); Heck v. Humphrey, 512 U.S. 477, 481 (1994); Edwards v. Balisok, 520 U.S. 641, 648 (1997). “He must seek federal habeas corpus relief (or appropriate state relief) instead.” Wilkinson, 125 S.Ct. at 1245.

Here, Plaintiff utilizes his § 1983 complaint to challenge the validity and duration of his confinement by arguing he must be released from custody due to Defendant’s alleged constitutional violations. However, the relief he seeks can only be brought in the form of a writ of habeas corpus, not a § 1983 action. Accordingly, the Court recommends Defendant’s motion to strike Plaintiff’s prayer to be released from custody be GRANTED.

IV. CONCLUSION


For the reasons set forth herein, it is recommended that Defendant’s motion to dismiss be GRANTED and motion to strike Plaintiff’s prayer to be released from custody be GRANTED. The Court recommends that:

- (1) Plaintiff’s Fourth, Fifth, and Fourteenth Amendment claims be DISMISSED WITHOUT PREJUDICE pursuant to Rule 12(b)(6).
- (2) Plaintiff’s Ninth Amendment claim be DISMISSED WITH PREJUDICE pursuant to Rule 12(b)(6).
- (3) Plaintiff’s Eighth Amendment claim be DISMISSED WITHOUT PREJUDICE and without leave to amend pursuant to § 1997e(a).
- (4) Plaintiff’s state law claim be DISMISSED WITHOUT PREJUDICE pursuant to § 1367(c)(3).

1 This Report and Recommendation of the undersigned Magistrate Judge is submitted to the
2 United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)
3 (1994).

4
5 This report and recommendation will be submitted to the United States District Court judge
6 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file
7 written objections with the Court and serve a copy on all parties on or before **September 10, 2007**.
8 The document should be captioned "Objections to Report and Recommendation." Any reply to the
9 objections shall be served and filed no later than ten days after being served with the objections.
10 *The parties are advised that no extensions of time will be granted for purposes of filing objections.*
11 The parties are further advised that failure to file objections within the specified time may waive the
12 right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
13
14

15 DATED: August 10, 2007

16
17 
18 LOUISA S PORTER
19 United States Magistrate Judge

20 cc: The Honorable John A. Houston
21
22 all parties
23
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Johnson v. Darr
United States District Court Case No. 08-CV-0080-DMS (POR)

Exhibit C:

**Order Adopting Report and Recommendation filed December
13, 2007, in case no. 06-CV-01257-JAH (POR)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MATTHEW LOUIS JOHNSON,

Plaintiff,

v.

CORRECTIONAL CAPTAIN DARR,

Defendant.

Civil No. 06cv1257 JAH(POR)

**ORDER OVERRULING
PLAINTIFF'S OBJECTIONS;
ADOPTING THE MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION; AND
GRANTING DEFENDANT'S
MOTION TO DISMISS [DOC. # 7]**

INTRODUCTION

Plaintiff Matthew Louis Johnson ("plaintiff"), a state prisoner appearing *pro se*, has filed a complaint pursuant to 42 U.S.C. § 1983, alleging defendant Correctional Captain Darr ("defendant") violated his federal and state constitutional rights. Defendant, in lieu of an answer to the complaint, filed a motion to dismiss all of plaintiff's claims. The Honorable Louis S. Porter, United States Magistrate Judge, submitted a report and recommendation recommending that defendant's motion be granted in its entirety. Plaintiff filed objections to the report. After a careful consideration of the pleadings and relevant exhibits submitted along with the magistrate judge's report and objections thereto, and for the reasons set forth below, this Court OVERRULES plaintiff's objections, ADOPTS the magistrate judge's report and GRANTS defendant's motion to dismiss in its entirety.

//

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BACKGROUND

The instant complaint stems from an attack upon plaintiff by eight other inmates at Centinela State Prison in Imperial, California on July 21, 2005. *See* Compl. at 10.¹ Plaintiff alleges the attack occurred because plaintiff was directed, as a “Mac Rep,”² by defendant to speak with other inmates about a race riot between Hispanic and African-American inmates that had taken place on July 17, 2005, but, while plaintiff was attempting to speak with the inmates, four previously locked down cells were allegedly ordered opened by defendant, allowing eight Hispanic inmates to exit their cells and attack plaintiff, causing injuries to his lip and head. *Id.* at 3-4.

In his complaint, plaintiff alleges defendant violated his rights under the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article 1, section 7, paragraph (a) of the California Constitution. *See* Compl. at 2, 12; Rep. at 1 n.1. Defendant filed his motion to dismiss on December 4, 2006. Plaintiff’s opposition was filed on December 26, 2006. Defendant filed a reply brief on January 8, 2007. The magistrate judge’s report and recommendation was issued on August 10, 2007. Plaintiff filed his objections to the report on August 27, 2007. No reply to plaintiff’s objections was filed.

DISCUSSION

1. Legal Standard

The district court’s role in reviewing a magistrate judge’s report and recommendation is set forth in 28 U.S.C. § 636 (b)(1). Under this statute, the district court “shall make a *de novo* determination of those portions of the report... to which objection is made,” and “may accept, reject, or modify, in whole or part, the findings or

¹ The instant complaint consists of seven (7) pages on a form complaint and seven (7) handwritten pages containing the factual allegations surrounding the claims listed on the form complaint. Both the form complaint and the handwritten pages are numbered as pages 1 through 7. For ease of reference, this Court has numbered the plaintiff’s handwritten pages attached to the form complaint consecutively with the form complaint beginning with page number 8 through page number 14.

² Apparently, a “Mac Rep” is a representative of the Men’s Advisory Counsel which consists of inmates selected by the general population of inmates to act as advisors to the Warden on matters of common interest to the inmates and administration. *See* Rep. at 2 n.3 (citing Mot. at 2 n.2).

1 recommendation made by the magistrate [judge].” It is well settled, under Rule 72(b) of
2 the Federal Rules of Civil Procedure, that a district court may adopt those parts of a
3 magistrate judge’s report to which no specific objection is made, provided they are not
4 clearly erroneous. Thomas v. Arn, 474 U.S. 140, 153 (1985).

5 2. Analysis

6 Defendant moves to dismiss: (1) plaintiff’s federal constitutional claims on
7 exhaustion grounds; (2) plaintiff’s state law tort cause of action on the grounds that he
8 failed to allege he timely filed a government tort claim; (3) plaintiff’s Fourth, Fifth, Ninth
9 and Fourteenth Amendment claims and his California constitutional claim on the grounds
10 that each fail to state claim upon which relief may be granted; and (4) plaintiff’s Fifth and
11 Fourteenth Amendment claims because they are subsumed by his Eighth Amendment
12 claim. Defendant also moves to strike plaintiff’s prayer for relief which seeks release from
13 custody because such relief is not available to plaintiff in this suit.

14 The magistrate judge, in the report and recommendation, found that plaintiff’s
15 Fourth, Fifth and Fourteenth Amendment claims should be dismissed for failure to state
16 a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiff
17 failed to provide facts to support his claim and because his claim under these amendments
18 are subsumed by an analysis under the Eighth Amendment, which provides an explicit
19 textual source for plaintiff’s excessive force claim. *See Rep.* at 4-6. The magistrate judge
20 further found that plaintiff’s Eighth Amendment claim should be dismissed for failure to
21 exhaust administrative remedies, in that plaintiff failed to complete the Third Level of
22 Review required to bring suit in federal court. *See id.* at 9-11; *see* Cal.Code Regs. tit. 15
23 § 3084.5; Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D.Cal. 1997). In addition, the
24 magistrate judge determined that plaintiff’s state law claims should be dismissed pursuant
25 to 28 U.S.C. § 1367(c)(3) because plaintiff’s federal claims are not viable. *Id.* at 12.
26 Finally, the magistrate judge found that plaintiff’s prayer for relief seeking release from
27 custody should be stricken because such relief is only available through a writ of habeas
28 corpus. *Id.* at 13.

1 Plaintiff present only general objections to the magistrate judge's report. However,
2 petitioner claims that, because he is not versed in the law, he does not understand the
3 magistrate judge's explanation of the reasons for dismissal of plaintiff's claims and prayer
4 for relief, claiming the issues presented are complex. *See* Obj. at 2-3. Petitioner also
5 suggests that the magistrate judge's findings and conclusions in this case were biased
6 against him because the same magistrate judge previously recommended dismissal of a
7 prior suit filed by plaintiff. *See id.* at 3-4. Based on a review of the well-articulated
8 pleadings presented by plaintiff in this case, this Court is unconvinced that plaintiff cannot
9 understand the issues presented here. This Court is also unconvinced that the magistrate
10 judge's recommendation for dismissal of a prior lawsuit filed by the same plaintiff is
11 sufficient evidence that the magistrate judge harbors any ill will toward plaintiff. Plaintiff
12 presents no other specific objections to the magistrate judge's report.

13 As stated previously, this Court may adopt those parts of the magistrate judge's
14 report to which no specific objection is made, provided the findings and conclusions are
15 not clearly erroneous. Thomas, 474 U.S. at 153. This Court has thoroughly reviewed the
16 magistrate judge's report, as well as the entire case file in this matter, and finds that the
17 magistrate judge's report presents a well-reasoned and cogent analysis of the merits of
18 plaintiff's Fourth, Fifth and Fourteenth Amendment claims, the exhaustion issue involving
19 plaintiff's Eighth Amendment claim, as well as the availability of plaintiff's prayer for relief
20 seeking release from custody in this Section 1983 case. As such, this Court finds the
21 magistrate judge's findings and conclusions on the issues presented in defendants' motion
22 are not clearly erroneous. Therefore, this Court **OVERRULES** petitioner's general
23 objections and adopts in full the magistrate judge's findings and conclusions on all issues
24 presented in the instant motion.

25 //

26 //

27 //

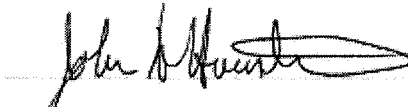
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CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's objections to the magistrate judge's report are **OVERRULED**;
2. The magistrate judge's findings and conclusions presented in the report and recommendation are **ADOPTED in full**;
3. Defendants' motion to dismiss plaintiff's complaint is **GRANTED in its entirety**; and
4. The instant complaint is **DISMISSED WITHOUT PREJUDICE**.

Dated: December 13, 2007


JOHN A. HOUSTON
United States District Judge

Johnson v. Darr
United States District Court Case No. 08-CV-0080-DMS (POR)

Exhibit D:

Judgment, entered December 13, 2007, in case no.
06-CV-01257-JAH (POR)

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Matthew Louis Johnson

V.

JUDGMENT IN A CIVIL CASE

Correctional Captain Darr

CASE NUMBER: 06CV1257-JAH(POR)

☐

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's objections are overruled. The Magistrate Judge's Report and Recommendation are adopted. Defendant's motion to dismiss is granted. The instant complaint is dismissed without prejudice.

December 13, 2007

Date

W. Samuel Hamrick, Jr.

Clerk

s/J. Petersen

(By) Deputy Clerk

ENTERED ON December 13, 2007

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Johnson, Matthew L. v. Darr**

No.: **08CV0080 DMS POR**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On July 18, 2008, I served the attached **DEFENDANT'S REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

Matthew L. Johnson
D-33369
California Training Facility
DW-315 UP
CTF Central
P.O. Box 689
Soledad, CA 93960

In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 18, 2008, at San Diego, California.

K. Alvarez

Declarant

Signature

70130654.wpd